No. 74-907

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

THOMAS E. KEYSER, INDIVIDUALLY and Doing Business As KEYSER TOWING COMPANY,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

OSCAR SHEPARD, INDIVIDUALLY, AND HOLLENBECK TOW SERVICE, a Corporation,
Petitioner,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI CALLING ATTENTION TO NEW CASE

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Petitioners, Thomas E. Keyser (individually and doing business as Keyser Towing Company, and Oscar Shepard, individually, and Hollenbeck Tow Service, a corporation (parties in two separate cases which were tried together and heard on appeal together) who have heretofore filed a petition for writ of certiorari in this matter, which petition is pending, pursuant to the provisions of Subsection 5 of Rule 24 of Revised Rules of the Supreme Court of the United States, file this supplemental brief to call to the Court's attention a new case not available at the time of the filing of the petition.

NEW CASE BY THIS COURT BEARING DIRECTLY ON ISSUE IN PETITION FOR WRIT OF CERTIORARI

Subsequent to the filing of the petition for writ of certiorari by petitioners herein, their counsel received Advance Sheets Booklet No. 6 of volume 95 of Supreme Court Reporter, dated January 15, 1975 containing the case of:

Gulf Oil Corporation, et al. v. Copp Paving Co., Inc., et al.,
(argued October 21, 22, 1974, decided December 17, 1974)

___ U.S. ___, 95 Supreme Court 392.

This case -- as is the petitioners' case herein -- was from the Court of Appeals for the Ninth Circuit.

There the Court of Appeals -- as it has done in this case -- held that a local activity involving no transaction concerning more than one state was "in commerce" as a matter of law.

Its decision involved a determination of whether local suppliers of interstate highway building materials were engaged "in commerce" under the Robinson-Patman and Clayton Acts (15 U.S.C. 12, 13, 13(a), and 14) which defines "commerce" substantially as it is defined under the Fair Labor Standards Act (29 U.S.C. Sec. 203(b)), the Act involved in the case of petitioners' herein.

This Court in the above case, Gulf Oil v. Copp Paving Co., supra, reversed the Court of Appeals for the Ninth Circuit, holding that such local activity of supplying building materials for the construction of interstate highways did not place such suppliers "within the flow of interstate commerce" as specified in the Robinson-Patman and Clayton Acts.

This ruling is significant here for the same Court of Appeals has determined that automotive roadside tow service drivers serving the needs of local motorists within restricted small areas inside the city of Los Angeles, one of which areas had passing through it local

freeways which were the internal transportation routes of the city but which were labelled interstate highways, were "in commerce" as defined by the Fair Labor Standards Act.

In the Robinson-Patman and Clayton Acts, involved in the Gulf Oil case, commerce is defined as:

> "'Commerce,' as used herein means trade or commerce among the several states and with foreign nations. . . ." 15 U.S.C. 12.

"Commerce" as defined in the Fair Labor Standards Act, involved in petitioners' case, is:

> "'Commerce,' means trade, commerce, transportation, transmission or communication among the several states or between any state or any place outside thereof." (29 U.S.C. 203 (b).

This Court has pointed out in the above case, Gulf Oil Corp. v. Copp Paving Co., Inc., that the language of the Clayton and the Robinson-Patman Acts was facially narrow, and that when the Patman bill was passed by the House it contained in addition to its present narrow language of Sec. 2(a) the following:

> "It shall be unlawful for any person, whether in commerce of not, either directly or indirectly to discriminate, etc." (H.R. 8442,

74th Congress, 2nd Session 1936.)

Whereas the Conference Committee deleted this "effects on commerce" provision, leaving only the "in commerce" language which is now contained in the Acts.

The same situation occurred as to the Fair Labor Standards Act, for as pointed out in Kirschbaum v. Walling, 316 U.S. 517, 522, 62 Supreme Court 1116, 1119, 1120, the original bill that passed the House applied to employers "engaged in commerce in any industry affecting commerce," but the bill recommended by the Conference and as enacted applied only to employees "engaged in commerce (or in the production of goods for commerce)" (H.R. No. 2738, 75th Cong., 3rd Session, pp. 29-30; 83 Cong. Rec. 9158, 9266.67). The "affecting" was eliminated.

In Gulf Oil Corporation v. Copp Paving Co., Inc., the Court does distinguish two situations under the Fair Labor Standards Act from the situation in such case.

The first was that involved in the Overstreet v. North Shore Corp., 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943). There, employees were engaged in maintaining a toll road and drawbridge between Fort George Island which is separated from the Coast of Florida by the intercoastal waterway.

The Court pointed out that the drawbridge affected interstate commerce on the intercoastal waterway and the drawbridge and the road were

the only means of access between Fort George Island and Florida and the other states and thus the employees were "engaged in commerce." (Yet, in the case of McLeod v. Threlkeld, 319 U.S. 491, 53 Supreme Court 1218, decided four months after the Overstreet case, the court held that a cook and caretaker for maintenance-of-way men on a railroad was not engaged "in commerce" pointing out that the proposal to have the act applied to industries "affecting" commerce was rejected in favor of the language now in the act.)

(Petitioners' employees do not maintain or service any instrumentalities of commerce.)

The second situation relating to the Fair Labor Standards Act mentioned in the Gulf Oil case by this Court was in the case of Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S.Ct. 565, 97 L.Ed. 745 (1953). There employees engaged in the manufacture of materials used for the construction of interstate highways were deemed to be engaged "in the production of goods for commerce," as provided in the Fair Labor Standards Act. This Court pointed out in the Gulf Oil case - and it applies here, too - that that situation is not applicable because the issue presented is "in commerce," (not production of goods for commerce).

Thus, in view of the fact that the definition of "in commerce" contained in the Robinson-Patman and Clayton Acts, and that contained in the Fair Labor Standards Act are substantially the same, that the legislative history as to each

of such acts indicates that the final language adopted for "in commerce" was far more restrictive than originally proposed and that - as in the situation in the Gulf Oil case - the acts of employees of Petitioners herein do not involve any transactions with more than one state (or maintain or service any instrumentality of commerce) the reasoning and determination of this Court in Gulf Oil Corp. v. Copp Paving Co., Inc., as to not being "in commerce" should apply to petitioners' employees herein.

Respectfully submitted,

G. G. BAUMEN

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